

Editor's note: Reconsideration denied by order dated Jan. 4, 1977; Appealed – aff'd, sub nom. Bradford Mining Corp. v. Andrus, Civ. No. LV-77-218 (D.Nev. Mar. 15, 1979)

UNITED STATES

v.

J. R. OSBORNE, ET AL.

(Supp. on Judicial Remand)

IBLA 76-19 Decided November 8, 1976

Review of an appeal on remand from the United States District Court for the District of Nevada.

The decision in United States v. Osborne, 77 I.D. 83 (1970), is sustained.

1. Contests and Protests: Generally–Evidence: Sufficiency –Evidence: Weight–Mining Claims: Determination of Validity

Where, at the hearing of a mining claim contest, the transcript of a previous hearing in another related contest is received in evidence, those portions of the transcript which are relevant and material to the case at hand may form, or contribute to, the basis for the decision in the case, regardless of which party introduced the transcript in evidence.

2. Evidence: Admissibility–Evidence: Weight–Mining Claims: Discovery: Marketability

The testimony of a qualified geologist and professional mining evaluation engineer concerning the marketability of a deposit of sand and gravel at a particular time may be accorded substantial evidentiary weight under the standard in Vernue v. United States, 457 F.2d 1202 (9th Cir. 1972), if it is established that he was in the area at

the time, had studied the local sand and gravel market and the factors which affected it, as well as the nature of the material and the methods and costs of removing, processing and marketing it.

3. Evidence: Sufficiency--Mining Claims: Determination of Validity--Mining Claims: Discovery: Marketability

Material which is principally valuable for use as fill, sub-base or ballast, for which ordinary earth or rock may be used, is not locatable under the mining laws, and even if the material is suitable for other purposes, its value for the above uses cannot be considered in determining its marketability as a valuable mineral deposit within the ambit of the general mining law.

4. Administrative Procedure: Burden of Proof--Mining Claims: Contests--Mining Claims: Determination of Validity

In a government contest of the validity of a mining claim it is the claimants who are the true proponents of a rule or order, namely that they have complied with the mining laws and have qualified to receive fee title to the land.

5. Evidence: Sufficiency--Evidence: Weight--Mining Claims: Common Varieties of Minerals: Generally--Mining Claims: Contests--Mining Claims: Discovery: Marketability

In a contest of a mining claim located for common variety mineral materials prior to July 23, 1955, after which such locations were proscribed by law, where there has been no mining and no sales, the test of the validity of the claim is whether the claimant(s) could have mined and marketed the material profitably prior to that date and thereafter. The evidence tending to

so show must relate to what a prudent man would have been reasonably justified in doing based upon the actual known circumstances at the time, not upon what he might have done if the proper conditions had then prevailed.

6. Evidence: Credibility—Evidence: Weight—Mining Claims: Contests—Mining Claims: Determination of Validity

While the existence of other land values does not qualify a locator's rights under the mining law if he has a valid claim, evidence of such other values may be considered in assessing the weight and credibility to be accorded the locator's testimony in determining whether a discovery has been made, and may be a factor in evaluating his bona fide intention to develop a mining operation.

7. Evidence: Generally—Mining Claims: Contests—Mining Claims: Determination of Validity—Mining Claims: Discovery: Marketability

In determining whether a profitable market existed for material from a particular mining claim from which no material has been sold, a hypothetical market must be created in which the new material plays its part. The new material from the claim at issue must be included with that from all other known potentially competitive sources in calculating the factor of supply. If the supply so calculated amounts to a superabundance and so overwhelms the existing demand as to reduce the value or profit increment to a level below that which would prove attractive to a prudent man, the material cannot be said to be marketable at a profit.

APPEARANCES: Otto Aho, Esq., Field Solicitor, United States Department of the Interior, Reno, Nevada, for contestant; Harry D. Pugsley, Esq., Salt Lake City, Utah, and John L. Thorndahl, Esq., Las Vegas, Nevada, for contestees.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

A review of the background of this case is necessary to our present consideration of the issues and evidence.

In June 1952, four association placer mining claims of 160 acres each, the Bradford Nos. 1, 2, 3 and 4, were located for sand and gravel. These four claims covered all of Section 32, T. 22 S., R. 61 E., M.D.M., in Clark County, Nevada, 12-1/2 to 13-1/2 miles south of the center of Las Vegas. The locators applied for patent to all four claims (Serial No. Nevada 025248).

In June 1953, the Bureau of Land Management initiated contest proceedings challenging the validity of the Bradford Nos. 1, 2 and 3 claims. ^{1/} The contest complaint charged, in substance, that minerals had not been found on the claims in sufficient quantity and quality to constitute a valid discovery, that there had been no production or sale of valuable minerals from the claims, and that there was no showing that a marketable mineral product existed within the claims' limits. Commencing November 30, 1954, a 3-day hearing was held, during which time a substantial volume of testimony and exhibit evidence was adduced regarding the sand and gravel found on section 32, the purposes for which these materials might be used, the nature, extent and cost of the processing which would be required, prospective markets, competitive sources of supply, hauling distances and costs, water requirements, etc. The record made at the hearing is important to our review of the instant case, because it was introduced by the claimants in the subsequent hearing of the contest to determine the validity of the Bradford No. 4 claim, which is the subject of this review.

Following the 1954 hearing, a State court proceeding and successive administrative appeals, the Bradford nos. 1, 2 and 3 claims were ultimately held to be null and void by the Secretary. United States v. R. B. Borders et al. and J. R. Osborne et al., A-28624 (October 23, 1961). Upon judicial review, the United States District Court for the District of Nevada held, inter alia, that the Departmental decision finding that there had been no discovery of valuable minerals in the claims for

^{1/} During this same period the Bureau also initiated contest proceedings against the Bradford No. 4 and, when no answer was filed, a decision was rendered by the land office summarily holding the Bradford No. 4 null and void. However, on appeal to the Director, Bureau of Land Management, this decision was reversed and the Bureau's Nevada Office was instructed to proceed anew. Director's decision United States v. Borders et al., Nev. Contest Nos. 2468 and 2469 (August 25, 1958).

sand and gravel was supported by the evidence that the claimants had failed to remove and process materials from the claims, and the Court held that the Bradford Nos. 1, 2 and 3 claims were null and void. Osborne v. Hammitt, 377 F. Supp. 977 (1964).

In 1961, while these proceedings involving the Bradford Nos. 1, 2 and 3 were in progress, another contest was instituted attacking the validity of the Bradford No. 4 claim. United States v. Osborne et al., Contest No. Nevada 3218. The contest complaint charged:

1. Minerals have not been found within the limits of the claim in sufficient quantities to constitute a valid discovery.
2. No discovery of valuable minerals has been made within the limits of the claim because the mineral material present cannot be marketed at a profit and it has not been shown that there existed an actual market for these materials prior to July 23, 1955 - Public Law 167 (69 Stat. 367; 30 U.S.C. 1958 ed., sec. 601).

The hearing of the contest of the Bradford No. 4 claim was convened on July 13, 1964. The claimants presented as evidence their Exhibit C, which is the entire 327-page transcript of the 1954 hearing held on the validity of the Nos. 1, 2 and 3 claims (1964 Tr. 67). Thus, the Hearing Examiner had before him as evidence the 1954 transcript as well as the record made in the hearing conducted by him in 1964. However, in view of the fact that the case of Osborne v. Hammitt, based on the 1954 record, was then pending in the Nevada District Court, the parties agreed with the Hearing Examiner that his decision would be deferred pending his receipt of the District Court's decision in that case.

Upon his receipt of the District Court's decision in Osborne v. Hammitt, which by then was final, the Hearing Examiner issued his decision. He found from the evidence presented that the sand and gravel on the Bradford No. 4 has no special or distinct qualities which would distinguish it in composition or character from other deposits in the Las Vegas area, but that the material could be mined "at the present time" (1964), removed and marketed at a profit, provided that the operators in all other respects could compete with the other operators mining sand and gravel. The Hearing Examiner noted the similarity between the evidence presented in this case and that presented in Osborne v. Hammitt, *supra* (which was also part of his record), and that the Court had rejected the claimant's evidence in that case as speculative, hypothetical and theoretical. He also quoted from the District

Court's opinion to the effect that in 1955 sand and gravel claims in the Las Vegas Valley comprised more than 100,000 acres of public land, and that not more than 1 percent of the material thereon might have been marketable in the reasonably foreseeable future. Accordingly, the Hearing Examiner concluded that the allegations in the contest complaint had been sustained, and he held that the Bradford No. 4 claim was null and void.

His decision was affirmed on successive appeals to the Director, Bureau of Land Management, and to the Secretary of the Interior. United States v. Osborne, 77 I.D. 83 (1970).

The contestees then sought judicial review of the administrative proceedings by filing suit in the United States District Court for the District of Nevada. That Court found that the Departmental decision was not arbitrary or capricious and that there was substantial evidence in the record to support it. The Secretary of the Interior's decision of May 26, 1970 (77 I.D. 83), was affirmed. Osborne v. Morton, Civ. No. LV 1564 (D. Nev., entered March 1, 1972).

The claimants then appealed to the United States Court of Appeals for the Ninth Circuit. That Court affirmed the ruling of the District Court with respect to the validity of the administrative proceedings. However, it vacated the judgment and remanded the case to the District Court with directions to review the administrative record and reassess the factual conclusions concerning the value of the mineral deposit in light of the decision rendered by the Ninth Circuit in Vernue v. United States, 457 F.2d 1202 (1972), shortly after the District Court had decided the instant case. Osborne v. Morton, No. 72-2290 (9th Cir., filed Feb. 22, 1974).

In turn, by its opinion filed November 27, 1974, the District Court remanded the case to the Department of the Interior with orders to re-examine the issues presented and re-evaluate the criteria applied in making the previous decision in the light of Vernue and the opinion of the District Court on remand.

Upon receipt of the record by this Board an order was promulgated by which the parties were afforded the opportunity to submit briefs on the factual and legal issues addressed in the District Court's opinion. Such briefs were filed both by the Field Solicitor of the Department and counsel for the mining claimants.

Inasmuch as our review must be focused on the application of the Vernue criteria to the evidence presented in this case,

we begin with an appreciation of the holding of the Court of Appeals in Vermue. ^{2/} The Court said, at 457 F.2d 1204:

The government presented three witnesses, none of whom were in the Phoenix area from 1946 to 1948; nor did any one of them have personal knowledge of the sand and gravel market during that time. Since the crucial issue is the "marketability" of the sand and gravel during the 1946-48 period, their testimony sheds no light on that issue.

On the other hand, the appellee presented three witnesses, besides himself, all of whom testified directly as to the "marketability" of sand and gravel in the immediate vicinity of the Sandy No. 2 claim during the 1946-48 period. This testimony was clearly competent to establish the existence of a market for the material present on the claim.

[1, 2] It appears that the Secretary's decision was based solely on his findings that there were no sales of sand and gravel at a profit from the claim and that there was evidence of an abundance of material in the area other than on the Sandy No. 2 claim, despite the uncontradicted evidence introduced by appellee that the material on Sandy No. 2 was marketable at a profit during the 1946-48 period. In determining marketability, evidence of sales is only one factor to be considered in the application of the prudent-man and marketability tests. See Coleman, *supra*. In our opinion this lack of evidence as to sales and the fact that there was other material available does not constitute the substantial evidence required to support the conclusion of the Secretary, when, as here, there is positive evidence in the record of marketability. ^{1/}

After fully considering the evidence in the record as a whole, this court finds and concludes that the decision of the Secretary is not supported

^{2/} Subsequent decisions of the Ninth Circuit have provided further guidance for determining the validity of sand and gravel mining claims. See Clear Gravel Enterprises, Inc. v. Keil, 505 F.2d 180 (1974), and Melluzzo v. Morton, 534 F.2d 860 (1976). These are discussed infra.

by substantial evidence and that the decision of the District Court should be, and hereby is, affirmed.
[Emphasis added; footnote omitted.]

The words and phrases of special qualification employed by the Court in Verrue and underscored in the foregoing quotation are, we believe, significant. We find that the administrative record in this case affords a much more substantial evidentiary basis for the Departmental decision than was encountered by the Court in Verrue.

[1] First, as already noted, at the 1964 hearing of the Bradford No. 4 contest, the transcript of the 1954 hearings concerning the Bradford Nos. 1, 2 and 3 was introduced in evidence by the mining claimants. As the District Court observed in remanding the case, the 1954 hearings were not concerned with the validity of the Bradford No. 4. Thus, the 1954 transcript admittedly contains testimony that is specifically relevant to claims 1, 2 and 3 and without relevance to No. 4, a fact that was duly noted by the Hearing Examiner ^{3/} at the time it was offered in evidence. In offering the 1954 transcript, counsel for the mining claimants stated (1964 Tr. 60, 61):

MR. AUSTIN: The testimony taken at the earlier hearing, I would assume, while I was not present, I have a copy of that record and have studied it. Essentially it relates to and would be germane to this particular section, quarter section, inasmuch as the testimony related generally to Section 32.

HEARING EXAMINER: I don't have a copy of that transcript and if you feel that it should be made part of the record –

MR. AUSTIN: I would like very much to so move that it be made part of the record in these proceedings.

* * * * *

MR. AHO: I haven't – I don't know whether I ever bothered to read the transcript, but I will not so stipulate. It will be up to the Examiner if he wants to make the ruling.

MR. AUSTIN: We will make it available to the Hearing Examiner.

^{3/} The title "Hearing Examiner" has since been changed to "Administrative Law Judge" by order of the Civil Service Commission, 37 F.R. 16787 (August 19, 1972).

HEARING EXAMINER: I would have to consider which evidence there might be relevant and which might not. I don't know whether it would be admissible or not. It might take some time and since we are concerned with getting this done before 1965, and there aren't very many witnesses available now to testify as to the exact conditions of 1955. It might be very well material to consider that. It might be the best evidence available. I'm not making a ruling.

Thus, it was the contestees who asserted that the 1954 transcript was relevant and germane to a consideration of the validity of the Bradford No. 4 claim and related generally to the whole of Section 32, while it was the Hearing Examiner who recognized that he would be obliged to consider what portions of the evidence contained therein was relevant and what portions might not be.

Our study of the 1954 transcript reveals that, indeed, much of the testimony presented is material to the validity of the Bradford No. 4; i.e., evidence pertaining to the uses for which the material on Section 32 was suitable; the kind of processing which would have been necessary to qualify the material for particular uses and the cost of such processing; the nature and size of the market then prevailing; hauling distances, costs, and routes; the geology of the Las Vegas Valley generally, and the geology of Section 32 specifically; etc.

The contestees in this case can hardly be heard to object to the use of this evidence, as it was they who introduced it. It is, of course, axiomatic that evidence introduced by a party may be used against him as well as for him.

[2] William Shafer, an evaluation engineer (mining) employed by the Bureau of Land Management testified at the 1954 hearing. This testimony, we believe, provided much of the evidence upon which the Departmental decision in question was based. Vernue teaches, inter alia, that a government expert's testimony regarding the lack of sales and availability of other material cannot be accorded substantial weight where there is positive evidence to the contrary, unless he was in the area and had personal knowledge of the market at that time. However, in Vernue, the Court of Appeals also stated:

In determining whether the Secretary's decision was based on substantial evidence, this court finds the following language from Foster, supra, at 271 F.2d 836, 838 persuasive:

*** the case really comes down to a question whether the Secretary's finding was supported by substantial evidence on the record as a whole. We think it was. There may have been substantial evidence the other way also, but we do not weigh the evidence. The testimony of Shafer and his colleagues in support of the Government was clearly substantial and most certainly was not destroyed. He was an experienced man, knew sand and gravel, knew the Las Vegas area, and his testimony was clear, succinct and convincing. (emphasis added [by the Ninth Circuit Court of Appeals].)

Vernue v. United States, *supra* at 1203-4.

The District Court, in remanding this case to this Department took note of the foregoing quotation and observed that there is considerable disagreement over Mr. Shafer's qualifications as an expert on market conditions in the Las Vegas area, citing the following quotation from Osborne v. Hammitt, *supra*, 377 F. Supp. at 977:

*** the government witness, William L. Shafer, although well qualified as a mining engineer, had few, if any qualifications in experience and knowledge to testify concerning the material in the Las Vegas area and the costs of extraction and processing.

The District Court commented that there is no way to resolve these conflicting opinions. Since we must evaluate the evidence in this case in light of the standards provided in Vernue, it behooves us to begin by taking official notice that the William L. Shafer referred to in both cases is the same man. ^{4/} Unlike the government witnesses in Vernue, who had not been present during the critical period and had no personal knowledge of the market, Shafer had spent approximately 1 year's time during the preceding 4 years (1950-54) studying the sand and gravel situation in the Las Vegas area (1954 Tr. 49, 89). He had personally conducted a study of the market for sand and gravel

^{4/} Shafer subsequently became Chief of the Branch of Mining, Bureau of Land Management, and for the past 10 years has served on the staff of the House Committee on Interior and Insular Affairs, Congress of the United States, as the professional consultant on mining.

(1954 Tr. 76), as well as studies of the geology of the area, the nature and quality of the mineral materials found, their uses, the sources of supply which were then operative, the volume of their annual production, and the number of mining claims located for sand and gravel. His work focused on an area within a radius of 15 miles of the city (1954 Tr. 51, 66). Moreover, Shafer testified that in addition to his qualifications as an evaluation engineer (mining), and as a graduate geologist (1954 Tr. 39), he had previously been employed by the Bureau of Reclamation in the construction of earth fill and concrete dams (1954 Tr. 40), and on cross-examination he testified that he had worked in sand and gravel operations (1954 Tr. 103). The nature and extent of this latter experience was not developed by contestee's counsel.

Therefore, based upon his expert qualifications, his presence in the area at the time in question, and his personal knowledge of the sand and gravel market and the factors which affected it, we conclude that Shafer's testimony had full probative value under the Venue criteria. That testimony will be reviewed in more detail, subsequently.

[3] On our review of the entire administrative record we are immediately struck by the fact that as much as four-fifths of the market demand for sand and gravel in the Las Vegas area between 1952 and 1955 was for "fill" material, and that the claimants hoped to sell much of the material from the Bradford claims into this market. Under the mining law, claims may not be located for fill material, and the value of a mineral deposit may not be recognized to the extent that value depends on sales or potential sales of the material for use as fill. This is so because virtually any material will serve as fill, no special qualities being required.

Pursuant to 43 CFR 4.24(b), we take official notice of the following definitions of the term "fill" from A Dictionary of Mining, Mineral, and Related Terms, Bureau of Mines (1968 ed.), an official publication of the Department of the Interior:

* * * b. Manmade deposits of natural soils and waste materials. ASCE P 1826 * * * d. Material used to fill a cavity or passage. An embankment to fill a hollow or ravine, or the place filled by such an embankment. * * * as a verb, to make an embankment in or to raise the level of a low place with earth, gravel or rock. Webster 3d.e. * * * f. Tailings, waste, etc., used to fill underground space left after extraction of ore. h. an earth or broken rock structure or embankment. Nichols. i. Soil

that has no value except bulk. Nichols. j. Soil or loose rock used to raise a grade. Nichols.

At the 1954 hearing J. R. Henderson, owner and operator of Las Vegas Building Materials, himself the owner and operator of a large sand and gravel quarry and processing plant on unpatented mining claims situated 8 miles from Las Vegas, testified regarding the nature of the material, its uses, and the market into which it could be sold. He stated that there were three types of markets: (1) for concrete aggregates, (2) for "hot plant material" (oil treated or asphalt material), and (3) for fill materials. He explained that normal fill material is referred to as "pit run material," and its commercial use is, "Purely for filling around logs, footings, slabs, things of that category," and for the base course under highways (1954 Tr. 15). He stated that the concrete aggregates found in Las Vegas are "poor quality and must be processed or manufactured to bring into specifications which is very costly, because where you find the aggregates you do not find water, and you must wash certain fines out." He went on to say that without processing neither the sand nor the rock found in the area meets engineering specifications for construction projects (1954 Tr. 18).

With reference to the possibility of marketing sand and gravel without this beneficiation, William Shafer gave the following testimony (1954 Tr. 74-75):

Q. Are the sand and gravel materials found on the claims in question usable without washing?

A. To a limited extent. They would probably be usable without washing for certain lowgrade purposes or such as fill, rough fills, certain subgrade purposes on a road, filling around housing units or in any place where specification or closely graded materials were not required. For such purposes as that, the material could be used as pit run or without classification.

Q. Considering the cost of stripping and haulage, would the price received for this lowgrade material constitute a profitable operation in your opinion?

A. Probably it would, yes, because for lowgrade work such as that, it may not be necessary to strip the area at all. For fill purposes around housing units and merely to bring the level of the ground up to grade, it would probably be possible to use any material that had bulk because it's, the only

purpose is to bring the level of the surrounding area up to standard.

Q. Any dirt would do?

A. Unless it had some very peculiar qualities, yes, any dirt, any material that had bulk would probably do.

The sale of sand and gravel, rock or other material from a mining claim for use as fill material, or for such comparable purposes as sub-base, ballast or grade material, for which ordinary earth or rock could be used, cannot be considered in determining the marketability of the material on the claim. Such sales cannot be considered even if the material is suitable for other purposes which are cognizable under the mining law. United States v. Baker, 23 IBLA 319 (1976) appeal pending; United States v. Bienick, 14 IBLA 290 (1974); United States v. Harenberg, 11 IBLA 153 (1973); United States v. Barrows, 76 I.D. 299 (1969); aff'd, Barrows v. Hickel, 447 F.2d 80 (9th Cir. 1971); United States v. Hinde, A-30634 (July 9, 1968); United States v. Brewer, A-27908 (December 29, 1959); United States v. Proctor, A-27899 (May 4, 1959); United States v. Black, 64 I.D. 93 (1957); Holman v. State of Utah, 41 L.D. 314 (1912). See also Solicitor's Opinion, M-36295, Use of Special Criteria to Determine the Mineral Character of Mining Claims Located for Sand and Gravel (August 1, 1955).

Shafer estimated the total production of sand and gravel by both major and minor producers by obtaining the production records of some of the major producers and by calculating the production of the minor operators on the basis of the number of trucks they had operating and the number of trips made per day. On this basis he made a rough estimate that in 1953 the Las Vegas market absorbed 1,000,000 cubic yards of material (1954 Tr. 78, 79, 80). However, he then stated that this figure included all sand and gravel products, whether used as high specification concrete or fill material (1954 Tr. 82). Only about 200,000 yards of classified concrete aggregate and washed and classified sand was reported to the Bureau of Mines as produced in the area during 1953 (1954 Tr. 80, 81). Henderson had earlier testified that there were only three companies in the area, including his own, which were producing concrete aggregate, and that their combined total annual production was 300,000 tons of processed aggregate, or about 200,000 cubic yards (1954 Tr. 25, 26). Henderson's estimate of this production was therefor in agreement with Shafer's (1954 Tr. 118). On the basis of these figures only about 20 percent of the total sand and gravel production in the area was being processed and sold as concrete aggregate. It appears, therefore, that a huge volume of the total

market for sand and gravel in the Las Vegas area during the critical period was based upon a demand for unprocessed "pit run" material for use as common fill.

Even if the use of the material for fill or "borrow" could be considered in determining the validity of the claim, there was testimony from both sides that it probably could not have been marketed "pit run" at a profit from the Bradford No. 4. Shafer first testified that such material probably could be handled at a profit (1954 Tr. 75). He also acknowledged on cross-examination that "Technically and in theory * * * if you have a market for it," the overburden or stripping from the claim could be used for fill in highway work (1954 Tr. 96), and that there was a market for such in the Las Vegas area (1954 Tr. 97). However, on redirect examination Shafer denied any intention of testifying that a present profitable market existed for fill material from Section 32, stating:

THE WITNESS: I don't think, in my previous testimony, as I recall it, I don't think I made any estimate of the cost of producing fill material. The reference I had was if the 35 to 50 cents per cubic yard was the direct labor cost of producing concrete aggregate. I think I stated there that that did not include the cost of amortizing the cost of the plant and other indirect labor costs. I have forgotten the question now.

HEARING OFFICER FELTON: Will you read the question, please and the witness' answer, so far?

(The record was read.)

THE WITNESS: The sale price of the — the sale cost and the sale price of the fill material from the estimates and the information I have been able to obtain in the Las Vegas area would vary from 30 cents a cubic yard to approximately a dollar a cubic yard, depending upon the purpose for which it is used. Rough fill material in which bulk is the principle quality desired has sold for as low as 30 to 40 cents a cubic yard. Therefore, I did not testify that fill material sold at \$1.25 or \$1.50 a yard and, further answering Mr. Aho's question, I think the transportation costs and the lack of market for fill material in the vicinity of Section 32 would be a controlling factor. To my knowledge, there does not exist in that vicinity a market for fill material which is sufficient to justify the cost of extracting the material and marketing it. The only market I know of would be in the vicinity of Las Vegas

which would entail the transportation of eight to ten to thirteen miles.

(1954 Tr. 147).

Q. Would the cost of extracting or removing the fill in materials from the mining claim plus the cost of transporting that fill in material the eight, ten or thirteen miles be such as to enable a man performing such work to receive a profit in the ordinary course of business?

* * * * *

THE WITNESS: I can only answer that by saying I do not think it would be profitable because I don't think a market exists for the fill in material in the vicinity of Section 32 or in close enough proximity to Section 32 that the profit could be made upon the material.

(1954 Tr. 147).

This opinion was reinforced by Lester Bradley, manager of the second largest sand and gravel company operating in the Las Vegas area (1954 Tr. 293). Bradley, a witness for the claimants, testified concerning the market for fill material from Section 32 as follows:

Q. Would it pay a man to haul pit run material or fill in from Section 32 to Las Vegas?

A. I wouldn't say that it would, no, sir.

Q. What does fill in or pit run material sell for, say, around Las Vegas?

A. I believe, I don't sell any of it. I don't know exactly but I would imagine that they would have to sell it for, to be competitive, where they can go out any place and get pit run material, they'd have to sell it about a dollar a yard.

Q. It stands to reason you are not going 13 miles to get fill in material when it's right on the outskirts of town?

A. That's right.

(1954 Tr. 291-2).

At the 1964 hearing it was disclosed that the only production from the Bradford No. 4 claim occurred in 1961 when approximately 11,600 yards were used in the construction of Interstate Highway 15. This was removed without the claimants' knowledge and no payment was made to them. At the 1964 hearing Osborne was still ignorant of this taking (1964 Tr. 121). It was described by the BLM mineral examiner, Robert T. Webb, as follows:

Q. According to your information, was that the only material removed from the claim in question?

A. That is correct.

Q. And you said it was used for what purposes?

A. As an embankment for the road, fill to raise the grade of the road. "Borrow" they call it.

Q. And you used the term "borrow". I want to know what you mean by the word "borrow."

A. This is general Type 1 material that is not necessarily crushed. Pit-run material that is used to fill up a low spot to develop a grade for the road.

(1964 Tr. 46, 47).

The Field Solicitor representing the contestant at the 1964 hearing argued to the Hearing Examiner that this removal "[i]n 1961 for the purposes as fill material, as a base for a road or fill, is not sufficient to constitute a valid discovery" (1964 Tr. 55).

[4] Testimony at both the 1954 hearing and the 1964 hearing establish beyond question that the subject sand and gravel would require certain processing for commercial use as concrete aggregate, or as Type 1 or Type 2 base-course material. The 1954 testimony described the material as it exists in and around Section 32, while the 1964 testimony centered specifically on the material found on the Bradford No. 4 claim. In summary, the testimony of the several witnesses for both sides established that the sand and gravel deposit includes poorly sorted and graded material which contains an excess of both coarse and fine elements. There are extreme variations of thickness on the Bradford No. 4, ranging from about 10 inches to at least as much as 10 feet. On the southern portion of the claim are exposed layers of caliche, the depth and extent which are unknown, but which, if very thick, would present a barrier to mining. Present also are silts, dolomite (calcium magnesium carbonate), and limestone (calcium carbonate), the latter two being deposited as a chemical precipitant;

as well as some chert (a micro-silica and crystal that occurs as nodules and lenses) which is deleterious to concrete aggregate. The sum of the evidence shows that in order to use the material on the claim for any legitimate mineral purpose it would be necessary to strip off the surface from about 10 inches to 2-1/2 feet, and extract and process the material below. The nature and extent of the processing could vary, depending on the nature of the material being processed (whether sand or gravel) and the specifications of the intended use (various concrete aggregates and asphaltic aggregates, type 1 or type 2 base course material). The processing operations include crushing, washing, screening, and segregating by type and size ("classifying"), and disposal of waste and the deleterious substances thereby separated from the product. These operations require a processing plant and an adequate water supply. No testimony was adduced at either hearing which suggested that the material found on the Bradford No. 4 claim could be used without such processing for any purpose other than common fill, sub-base or grade material. Thus, the focus of our attention must be directed to whether the evidence establishes that this material could have been extracted, processed, removed and marketed at a profit on and before July 23, 1955. "If mining claimants have held claims for several years and have attempted little or no development or operations, a presumption is raised that the claimants have failed to discover valuable mineral deposits or that the market value of discovered minerals was not sufficient to justify the costs of extraction." United States v. Zweifel, 508 F.2d 1150, 1156 (10th Cir. 1975).

Where, as here, there are thousands of acres of generally homogeneous material in the immediate vicinity of a limited general market, it would theoretically be possible for a group of claimants to have located numerous 160-acre placer claims and to sell a little sand and gravel from each one at a profit. But that would not, of itself, validate all the claims, or any one of them. Such activity would not constitute a bona fide intent to develop a valuable mine, nor would it demonstrate that any particular claim contained a "valuable" mineral deposit on which a sustained, profitable, commercial mining operation could be conducted.

The problem created for the Department is in distinguishing the few valid claims which did compete, or reasonably could have competed profitably in the limited pre-1955 market, from the hundreds of claims for virtually identical material which did not compete successfully and probably could not have. The United States, as the contestant in such cases, has the burden of proving prima facie a negative fact, i.e., that the claimants were not reasonably justified in doing something many years previously which in fact they did not do. Doubtless, it was the D.C. Circuit Court of Appeals' recognition of the difficulty inherent in

proposition that prompted the Court in Foster v. Seaton, *supra*, to explain the evidentiary burden of the respective parties as follows:

[2, 3] Appellants' third allegation of error is that the Secretary failed to hold the Government to the standard of proof required by the Administrative Procedure Act, which states that "the proponent of a rule or order shall have the burden of proof." 60 Stat. 241 (1946), 5 U.S.C.A. § 1006. The Secretary ruled that, when the Government contests a mining claim, it bears only the burden of going forward with sufficient evidence to establish a prima facie case, and that the burden then shifts to the claimant to show by a preponderance of the evidence that his claim is valid. The short answer to appellants' objection is that they, and not the Government, are the true proponents of a rule or order; namely, a ruling that they have complied with the applicable mining laws. One who has located a claim upon the public domain has, prior to the discovery of valuable minerals, only "taken the initial steps in seeking a gratuity from the Government." [Citations and footnote omitted.]

* * * Were the rule otherwise, anyone could enter upon the public domain and ultimately obtain title unless the Government undertook the affirmative burden of proving that no valuable deposit existed. We do not think that Congress intended to place this burden on the Secretary.

271 F.2d at 837-8.

This would seem to be especially true where, as in this case, the locators have applied for a patent conveying to them fee title to the land.

[5] This Department was subsequently given further judicial guidance as to the standard to be applied to the evidence in such cases in Osborne v. Hammitt, *supra*, the companion case to the one now before us. In summarizing the evidence relating to the Bradford Nos. 1, 2 and 3 claims, the Nevada District Court said:

We do not discount the value of opinion evidence from qualified witnesses in cases dealing with fairly unique deposits of locatable minerals. This case is different. Sand and gravel of the same general quality found in the Bradford Claims is readily available in thousands of adjoining acres. The burden of the proponent, plaintiffs here, is not simply to preponderate in the evidence produced, its burden is to produce a preponderance of

credible evidence, and the trier of fact is not required to believe or to give weight to testimony which is inherently incredible. It is apparent from the evidence that if, in June 1952, owners of other claims near Las Vegas had commenced to produce and market sand and gravel from their properties, such action would have filled the theoretical void in the supply of the material to the Las Vegas market, rendering the Bradford claims valueless. The plaintiffs failed to enter the race to supply the theoretical insufficiency of production of sand and gravel. If they had done so successfully, they would have satisfied the requirements of *Foster v. Seaton* (*supra*) by proving bona fides of development and present demand. Their failure so to act contradicts the speculative, hypothetical and theoretical testimony on which they rely.

377 F. Supp. 985-86 (Emphasis added.)

A further contribution to the overall evidentiary picture was provided by the Ninth Circuit Court of Appeals in *Vernue v. United States*, *supra*:

* * * In determining marketability, evidence of sales is only one factor to be considered in the application of the prudent-man and marketability tests. See *Coleman*, *supra*. In our opinion this lack of evidence as to sales and the fact that there was other material available does not constitute the substantial evidence required to support the conclusion of the Secretary, when, as here, there is positive evidence in the record of marketability.

457 F.2d at 1204.

In *United States v. Gibbs*, 13 IBLA 382 (1973), this Board took emphatic notice of the holding in *Vernue*. The *Gibbs* opinion identified the nature of the inquiry in validity determinations of this type as follows:

It has repeatedly been held that proof of actual sales of minerals from the claims is not an indispensable element in establishing their marketability, and that while lack of development and sales may raise a presumption that the market value of the minerals found thereon was not sufficient to justify the cost of their extraction, this presumption may be overcome by evidence showing that the materials could have been extracted, removed and marketed at a profit before July 23, 1955. This rule rests on a

strong foundation. Verrue v. United States, *supra*; Barrows v. Hickel, *supra*; Palmer v. Dredge Corp., *supra*; Multiple Use, Inc. v. Morton, 353 F. Supp. 184 (D. Ariz. 1972), *aff'd* 504 F.2d 448 (9th Cir. 1974); United States v. Penrose, 10 IBLA 332 (1973); United States v. Harenberg, 9 IBLA 77 (1973); United States v. Humboldt Placer Mining Co., 8 IBLA 407 (1972); United States v. Lloyd O'Callaghan, Sr., 8 IBLA 324 (1972); United States v. The Dredge Corp., 7 IBLA 136 (1972); United States v. Stewart, (1972), *supra*; United States v. Isbell Construction Co., 4 IBLA 205, 78 I.D. 385 (1971); United States v. McCall, 7 IBLA 21, 79 I.D. 457 (1972); United States v. Stewart, 1 IBLA 161 (1970); United States v. Pierce, 75 I.D. 270 (1968).

Id., at 391.

Thus, we recognized the need to receive proper evidence of what the claimant could have done with the deposit prior to the critical date, while disregarding the "speculative, hypothetical and theoretical" evidence which the Court objected to in Osborne v. Hammitt, *supra*. We drew this distinction in Gibbs in the following manner:

Evidence relating to past conditions bearing upon whether the claimants could have marketed material from their claims at a profit, e.g., quality and quantity of material, costs of extraction, removal and beneficiation, existence and size of the market, unit prices then prevailing, hauling costs and distances, etc., is not speculative, hypothetical, or theoretical by definition. Such evidence, whether real or parol, may be entirely factual. The conclusion based upon such facts is, of course, hypothetical, since it relates to what could have been done in the past (the test imposed by this Department and the courts), but the hypothetical or theoretical nature of the conclusion does not characterize the evidence upon which it is based. To treat such evidence as speculative, hypothetical and theoretical and therefore insufficient to rebut the presumption is to give the presumption conclusive effect.

On the other hand, in any given case evidence of past conditions may well be so vague, uncertain, conjectural and inconclusive as to be fairly described as speculative and of insufficient weight to overcome the presumption of non-marketability.

An occasion for the practical application of this distinction was encountered in United States v. Taylor, 19 IBLA 9, 82 I.D. 68 (1975), where it was noted that the evidence in support of the claim was based entirely on what the claimants might have done if certain conditions had prevailed during the period prior to July 23, 1955:

In both Harenberg and Gibbs the evidence that the claimants could have profitably mined their respective claims in 1955 was factual evidence of conditions actually prevailing at that time. By contrast, the evidence offered by the contestees in this case was, to a large extent, speculation that if certain conditions had prevailed in 1955, these would have afforded a market into which the claimants might have been able to dispose of their material at a profit. Testimony that if the State had then wished to procure gravel in the area profitable sales could have been made, or that a nearby community might have been graveling a lot of streets does nothing to establish that a profitable market actually existed. The testimony that homeowners and other small volume users in the immediate vicinity would have purchased the material in 1955, had it been available, fails to establish that the claimants would have been justified, as prudent men, in expending their labor and means in installing and operating a screening plant on the Ute Park No. 1 claim in the reasonable expectation that sales of small lots of material to such purchasers would have been a profitable venture.

(Concurring opinion at 19 IBLA 50).

In sum, the Department has used the phrase "hypothetical, theoretical, and speculative evidence" when referring to evidence as to what a claimant might have been able to do if the proper conditions had prevailed, and not to what a prudent man would have been able to do based on the actual circumstances at the time.

Our review of this case discloses that much of the evidence which was calculated to show that the claimants could have profitably mined, processed and marketed the material from the Bradford No. 4 for legitimate mineral purposes prior to July 23, 1955, was indeed hypothetical, theoretical, speculative and conjectural.

The first evidence of this character deals with the prospect of developing an adequate supply of water. There was considerable testimony to the effect that water would be essential to beneficiate the material from the claim in order to use it for anything other than common fill (1954 Tr. 18, 19, 34, 71, 74, 88, 190, 217, 220). There is no surface water on section 32, and no attempt has been made to develop a source of water. Shafer testified that in determining the marketability of the material, one of the factors that would have to be considered "would be the availability of water for processing, washing and screening the material" (1954 Tr. 71). When asked if water would be available if a well were dug, Shafer was vaguely optimistic, saying (1954 Tr. 75):

A. I would have to answer that statement in a general way. I think, yes, that water probably would be available if a well was dug. It has been found on areas in the general vicinity that water is obtainable. To say that it would be obtainable on this specific section, I don't think I could say that.

This is nothing more than conjecture. Offsetting it rather dramatically is the testimony of J. R. Henderson, one of the area's largest producers of sand and gravel from an unpatented mining claim a few miles away. He testified that the processing operation "is very costly because where you find the aggregates you do not find water, and you must wash certain fines out" (1954 Tr. 18). He explained the washing process in greater detail and reiterated that it "is a costly operation in this area because of lack of water normally. In our operation we use 400 gallons a minute in the washing operation" (1954 Tr. 18, 19).

A. At the present time we are using waste water in place of magnesia [sic "artesian"?]. We drilled wells but there is no water there. We drilled a thousand feet.

Q. In the so-called Las Vegas area?

A. In the particular area which is next to Pittman, Nevada.

Q. How far is that from the town of Las Vegas?

A. Eight miles.

Archie D. Ryan, 5/ a civil mining engineer, testifying on behalf of the claimants, provided the only other testimony concerning the likelihood of obtaining water (1954 Tr. 222):

Q. Are you familiar with the water table in that area?

A. Not, [sic] there's a ten inch well three and a half miles north and a half mile west, a ten inch well that was drilled to a depth of 176 feet and has

5/ It is noteworthy that at the time he testified Archie Ryan also had a sand and gravel mining claim on nearby land for which he had submitted a patent application which had been pending before BLM "for months and months" (1954 Tr. 224). He also serves as a consultant to and prepares patent applications for other sand and gravel mining claimants and shall tract applicants (1954 Tr. 216; 250).

ten feet of water standing in it at the present time. I have never seen that well on production.

Q. Mr. Ryan, do you have an opinion as to whether in view of your observations there would be an adequate supply of water in the area described as Section 32 to provide for the necessary washing of sand and gravel?

A. I believe there would be.

The mere fact that nearly four miles away there is a well of unknown capacity is a very weak premise on which to found a belief that a high-volume production of water can be developed on the Bradford No. 4. Since water is essential, and its lack makes aggregate production "very costly," it would seem that prudence would demand that the claimants satisfy themselves as to its availability in sufficient quantity before they "[w]ould be justified in the further expenditure of their labor and means, with a reasonable prospect of developing a paying mine." Castle v. Womble, 19 L.D. 455, 457 (1894); Chrisman v. Miller, 197 U.S. 313, 322 (1905); Cameron v. United States, 252 U.S. 450, 460 (1920); Best v. Humboldt Placer Mining Co., 371 U.S. 334, 336 (1963); United States v. Coleman, 390 U.S. 599 (1968). Yet these claimants apparently are content to simply presume the availability of water on the claim in the desert to the approximate volume of 400 gallons per minute. No evidence was adduced to show how water would be obtained if none were found on the claim, or what effect this might have had on their ability to market aggregate at a profit prior to July 23, 1955.

Still concerned with the hypothetical, theoretical and speculative quality of much of the claimants' evidence, we turn to a consideration of how they believe material from the claim could have been marketed prior to July 23, 1955.

Osborne testified that in the summer of 1955, he believes, he "could have started operations" (1964 Tr. 124):

Q. What do you mean by "could have started possible operations?"

A. * * * There were bids and propositions being made to resurface around the Tropicana Hotel and also improvement work on McCarren Field and we attempted to make negotiations with the Ideal Asphalt Paving Company, but it was never consummated. So I can't say a valid lease went into effect. Quite a bit of filling in work and so forth around the airport and in that area, yes.

Q. What do you mean by "fill" work?

A. They used to use certain amounts of the coarsest stuff. Then we thought, even with the excavating to market for the removal of the coarsest stuff –

Q. You think then that in 1955 that if you had entered into a lease with the Ideal Asphalt Company, the material from the claim would have been used for fill purposes?

A. I think it would have been used both for fill and for gravel. Both, yes.

Q. What do you mean, for gravel?

A. Well, they would put a plant out there eventually on another section.

Q. Why didn't the Ideal Asphalt go through with your negotiations?

A. They found out it was under contest with the Bureau of Land Management.

Q. It never got back through the initial talking stage and they dropped it because there was a possible contest?

A. That is correct, yes, sir.

And, at (1964 Tr. 126):

Q. Now, prior to the summer of 1955, did you have discussions with anybody else?

A. We had discussions in 1954 with a real estate operator here, Archie Bell, operating as the Bell Realty Company, who discussed drawing up a lease with a Mr. Brant, who, at that time was supposed to own Section 28 across from 29. He was a big mining operator, coal mining operator back East. But it was never consummated.

Q. And what was the purpose of those talks, a lease or what?

A. A lease for operating for sand and gravel, putting a plant on the section.

Q. Those talks almost stopped right in the initial phases?

A. They didn't go any further, because this gentlemen got involved in some other difficulties, yes.

Thus, according to Osborne, in the summer of 1955 the only immediate market which might have been supplied with material from the claim was a demand for fill material which would have accepted "the coarsest stuff." We reiterate that such use is not cognizable under the mining law, and even if it were, both Shafer and Bradley testified, supra, that sales of fill from Section 32 would probably not be profitable. Further, Osborne has merely assumed that because contracts for fill were being let, the operator of the Bradford No. 4 could have secured a contract, if he could have found an operator.

Osborne's belief that the material could be used "for gravel" was speculative and future-oriented. It depended first upon leasing the property to an operator who would then exploit the claim for its fill material without processing, and if the operator decided "eventually" to build a plant nearby for crushing, screening, washing and such other processing as might be required, then the material could be utilized by the lessee for the legitimate mineral purposes for which gravel was generally locatable prior to July 23, 1955. This is hardly the kind of showing of a present profitable market existing in 1955 for material from the claim which is required by United States v. Coleman, supra, and which the claimants must prove under the rule in Foster v. Seaton, supra. It is, instead, the kind of hypothetical, theoretical and speculative evidence rejected by the Court in Osborne v. Hammit with respect to their claims on the other three-quarters of Section 32.

Osborne's 1964 testimony that he had tried unsuccessfully to lease the claim to Ideal Asphalt and to Mr. Brant, the "big coal mining operator back east," jibes with other testimony concerning the claimants' plans for the property. At the 1954 hearing Guy Jacka, another of the claimants, also testified that he had "tried to make a contract with a local firm to put a plant on that particular piece of property as soon as possible" (1954 Tr. 182). Jacka's testimony also indicated that much of the intended use of the material was for fill (1954 Tr. 186, 193, 196).

The picture which emerges is one where the group of claimants had located at least an entire section of public land for sand and gravel and, being unwilling or unable to develop the claims and market the material themselves, were endeavoring in

1954 and 1955 to lease the property to someone who would attempt to do so, even, apparently, using a real estate agent to find such an operator. This active but unsuccessful search for someone to buy or lease the material, even for fill, coupled with the failure of the claimants to undertake development themselves, is strong evidence that there was not then "a market for the discovered material that [was] sufficiently profitable to attract the efforts of a person of ordinary prudence." Barrows v. Hickel, 447 F.2d 80, 83 (9th Cir. 1971), accord Verrue v. United States, *supra*, 457 F.2d at 1203.

Still in the realm of hypothetical, theoretical and speculative evidence, we find that at the 1964 hearing, nine years after a claim for common gravel could be validated, the claimants were still hoping that someone would come along who would be sufficiently interested to eventually develop the claim and pay them for the privilege. To this end Pat R. Cosgrove, manager of North Las Vegas Concrete Company, testified that he had examined the claim about three weeks prior to the hearing in company with Osborne and Foster (1964 Tr. 109-110):

Q. Was it your thought you might build a plant on this site?

A. We felt we would haul the gravel from this site to another location further in town that we did have in mind.

Q. Where you already have a facility erected, is that so?

A. We do not have one erected at this particular time, but we may in the future put one in there. [Emphasis added.]

So, in 1955 Osborne was hoping to lease Ideal Asphalt Company, which he thought "would put a plant out there eventually," and in 1964 he was trying to lease to North Las Vegas Concrete Company on the strength of the prospect that the company "may in the future" build a plant which could handle material from the claim.

The hypothetical and theoretical nature of the claimants' evidence was illustrated again in the testimony of George C. Monahan, County Engineer of Clark County, Nevada. Called in 1964 by the claimants, Monahan stated his belief that in 1955 there was a market for gravel from Section 32. On cross-examination the following colloquy ensued (1964 Tr. 105):

Q. What market would there have been in 1955?

A. Again, I would have to go back on my memory, but as I remember, I know we were building a considerable amount of roads in the area and there was a considerable boom on the Strip as was pointed out by the attorney, and not only in 1955, but from 1955 on there has been a considerable demand for gravel of all types.

Q. Primarily for roads near or in the vicinity of the southwest quarter of Section 32, is that correct?

A. Well, not necessarily. It would be the hauling, that would determine it. Of course, if this was the closest pit available at this time, naturally, no matter where the road was, where it was in the immediate vicinity or several miles away, if this were the logical place to haul, why it would be. [Emphasis added.]

In actuality, although Monahan was the County Engineer and had lived in the vicinity for 17 years, he had little or no personal knowledge of the economics of gravel generally or the marketability of this deposit in particular in 1955, and said so (1964 Tr. 104-5):

Q. Did you ever make any actual study in 1955 as to whether or not materials could be moved from the southwest corner of Section 32 and marketed at a profit?

A. No.

Q. You stated that in 1955 there was a market for the materials, sand and gravel, that is found on the southwest quarter of Section 32.

A. Definitely a market for sand and gravel. And this gravel would meet the specifications, so adding them up, I would say there would be a market for this gravel.

* * * * *

Q. Well, now, from your observation and your knowledge of the area, do you have an opinion as to whether sand and gravel could be mined from the southwest quarter-section of Section 32, moved and marketed at a profit in July of 1955?

A. I don't get into the economics too much of gravel, but I would say that definitely it could if the haul would be a factor. The hauling would be a factor. [Emphasis added.]

Applying the standard set by the Court of Appeals in Verrue v. United States, *supra*, and stated in the opinion of the District Court in the remand of this case, to Monahan's lack of personal familiarity with the marketability of this particular deposit and the "economics of gravel" generally, it would not appear that his testimony can be accorded any significant weight. Moreover, his opinion that the material was marketable in 1955 is founded on the simple hypothesis that because a market for specification material existed at that time, and since this material could be processed to meet those specifications, ergo, this material could have been sold into that market. He then qualifies his opinion by saying, "* * * if this was the closest available pit at that time," and "if this were the logical place to haul * * *."

Archie Ryan was questioned about the value of the sand and gravel on Section 32 "as is." He responded (1954 Tr. 219-20):

The Witness: Well, it has to be removed or it wouldn't have any.

By Mr. Olsen:

Q. Well, if you were to sell it or lease it as is, what would be the value of sand and gravel as it is deposited now?

A. That is a very difficult question to answer, Mr. Olsen. The sand and gravel in place, if the sand and gravel is removed, if a plant was on these gravel claims that was capable of crushing, screening and probably washing the gravel?

Q. Well, suppose you just leased it to an operator who would perform all these functions?

A. Then, a fair return, the Bureau of Land Management in the leasing of sand and gravel, gets a return of 10 cents a yard. I think a return of 10 cents a yard would be a good royalty for an operator to take over the operation of this gravel.

Again we find that the value of the sand and gravel is made dependent upon the hypothetical leasing of the claim to an operator who would assume the risk of installing a processing plant, competing in the market and paying a royalty to the claimants.

Nothing in the record indicates that the association of eight claimants who located the Bradford No. 4 ever gave any consideration to devoting their own labor and means to an effort to develop a mine on the deposit, or to forming a company for that purpose. Of course, this is not, of itself, disqualifying. However, despite an active effort to find an operator who was willing to invest his labor and means to that end, none was forthcoming.

In 1961 the claimants did enter into a lease with Stewart Brothers, a local producer of sand and gravel (Exh. M). However, though the nominal "lessees" only agreed to pay 3 cents per cubic yard of material removed from the claim (although testimony, supra, indicated that 10 cents would be a fair return), they had no obligation to take anything, and in fact they took nothing. Thus the "lease" was nothing more than a 1-year option to take material from the claim at a bargain-basement price, which option was not exercised. Furthermore, we note that the lease was executed nearly 9 years after location of the claim and 6 years after the Act of July 23, 1955.

Pat Cosgrove's potential interest in the claim developed only a few weeks before the 1964 hearing, 12 years after the claim was located and 9 years after sand and gravel were withdrawn from location under the general mining law. Moreover, as we have seen, Cosgrove's interest is contingent on what may happen if a plant is built at Arden, 3 miles west of the claim. This is not the kind of evidence a person would now rely on in deciding whether to initiate actual mining operations, and certainly could not have relied on in 1955.

The hypothetical and speculative portions of the claimants' evidence may be summarized as follows: In July 1955 material from the claims could have been marketed at a profit if a dependable source of an adequate volume of water could be obtained at a cost which was not prohibitive; and if someone could be found to undertake the risk of development of a mine on the property and pay the claimants a royalty or rental for the privilege; and if a processing plant were erected either on the property or in close proximity thereto; and if the haul distance to the jobs was not too great and there were no competing sources appreciably closer; and if the operator of the claim could reasonably expect to secure contracts for a sufficient volume of specification material (not fill) to justify the risk expenditure in the prudent anticipation of a normal margin of profit. While all of these conditions would have had to exist, the evidence does not show that any of them did exist as a matter of demonstrated fact. The most that the evidence shows is that some of the conditions might have existed.

The most factual evidence in support of the marketability of the material was provided by the testimony of Lester Bradley. The principal market prior to July 23, 1955, was in the immediate Las Vegas area. He said the distance from Section 32 to the center of town (Fremont St.) was 13-1/2 miles and hauling costs would have been approximately 7 cents per yard mile, or 94.5 cents per cubic yard. The cost of washing, screening and other processing was estimated by him at 90 to 95 cents per cubic yard. This he said, yields a total cost of \$1.85 to \$1.90 per cubic yard, excluding managerial and office costs (1954 Tr. 285-86). (It also fails to include any allowance to amortize equipment and other capital costs. See 1954 Tr. 112.) Bradley also estimated the price of processed aggregate at \$2.25, leaving a profit of 35 to 40 cents before deduction of office and managerial costs and amortization of capital investment.

However, we note in Government's Exhibit No. 1 that approximately 3,670 acres of land averaging 6 to 7 miles closer to Las Vegas had already been patented. The savings of operators on those claims on transportation costs alone would be approximately 42 to 49 cents per cubic yard over an operator on this claim. In other words, the rate of profits would be more than twice as high on the claims closer to town. First, we question whether any prudent man would lease and operate this claim when he could double his rate of profit by dealing with a claimant closer to town. Second, we question whether a prudent man would expose himself to the risk inherent in being at such a competitive disadvantage in a competitive market. As we have seen, appellants' potential competitors, who are more closely situated to the market in Las Vegas, could quite easily sell at a price below appellants' costs, and yet still realize a profit. We take official notice of the proceedings in United States v. Foster, 65 I.D. 1 (1958), aff'd in Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959). The claims in the Foster case had been located by some of the same locators involved in this case. The Foster claims are 1 mile north of these claims and, hence, 1 mile closer to the market in Las Vegas. Everett Foster testified that those knowledgeable in sand and gravel had told him that his claims were a little too far from market. 65 I.D. at 5. Other witnesses at the Foster hearing testified to the same effect. 65 I.D. at 10. As the claims in Foster are closer to the market than this claim, a fortiori those claims, which were ultimately declared invalid, were closer to being valid than this claim, all other things being equal. In Clear Gravel Enterprises, Inc. v. Morton, 505 F.2d 180 (9th Cir. 1974), the Court found substantially similar claims invalid where they were situated only 10 road miles from the center of Las Vegas.

[6] The charge and testimony at the 1954 hearing that the land in Section 32 is more valuable for residential and business

purposes than for mining do not go to the validity of the claim. The law does not provide that mining claims which are otherwise valid may be held to be null and void by weighing the prospective value of their mineral yield against the present or prospective value of the land for other purposes. ^{6/} United States v. Kosanke Sand Corp. (On Reconsideration), 12 IBLA 282, 299; 80 I.D. 538, 547 (1973), and authorities therein cited. However, such evidence is material, as noted in the following passage from the Kosanke opinion:

While the existence of other values does not qualify the locator's rights under the mining law if he has a valid claim, it may be a factor in determining whether a valid claim exists. It may be considered in assessing the weight and credibility to be accorded the locator's testimony in determining whether a discovery has been made. Helen V. Wells, 54 I.D. 306, 309 (1933); E. M. Palmer, 38 L.D. 294 (1909). And it may be an issue in evaluating his bona fide intention to develop a mining operation. As the Court stated in United States v. Coleman, 390 U.S. 599, 602 (1968):

* * * Under the mining laws Congress has made public lands available to people for the purpose of mining valuable mineral deposits and not for other purposes. * * *

In this context it is germane to note Shafer testified that in the course of his examination of the mineral claim records of Clark County he found "certain names that appear upon the Bradford No. 1, 2 and 3 I have encountered, this would be an estimate, I would say eight or ten times on other locations" (1954 Tr. 133).

[7] In the interval since its consideration of this case, the Court of Appeals for the Ninth Circuit has issued its opinion in Melluzzo v. Morton, 534 F.2d 860 (1976). There the Court said, in part:

^{6/} The exception is found in the statutes relating to the location of placer claims for building stone (30 U.S.C. § 161) and saline deposits (30 U.S.C. § 162), each of which provide that the land must be "chiefly valuable" for the particular mineral.

Verrue was not the last word of our court on this subject. [Citing Clear Gravel Enterprises, Inc. v. Keil, 505 F.2d 180 (1976).]

* * * * *

* * * Verrue makes it plain that the claimant need not rely on his own successful marketing efforts to prove marketability of his material. If the successful marketing by others has sufficiently established that the claimant's comparable material is itself marketable, that can suffice.

But there is more to proof of marketability than proof that there was a local market for sand and gravel. The claimant must establish that his material was of a quality that would have met the existing demand and that it was marketable at a profit. As to the matter of quality, appellants would appear to have no problem. As to the matter of profitable marketing, questions remain. [fn. 2 omitted.]

* * * * *

Two profit factors can be drawn into question in considering whether a claimant's material, although it had not been marketed at a profit, nevertheless could have been marketed at a profit.

[5] 1. The cost factor. It must appear that the cost of extraction, preparation for market and transportation to market will, in the claimant's case, provide a value increment or profit comparable to that which attaches to the material being successfully marketed by others. 3/ [fn. 3 omitted.]

2. The demand factor. It must appear that the local demand was able to absorb additional material such as the claimant's and still permit an attractive profit to be realized. It is for that profit that the newcomer, under Barrows, must be permitted to compete. In order to ascertain whether a demand existed for hitherto unmarketed material a hypothetical market must be created in which the new material plays its part. If the profitability of the market for such material is realistically to be ascertained by setting the factor of demand

opposite that of supply, the new material must be included with that from all other known potentially competitive sources in calculating the factor of supply. 4/ If supply so calculated amounts to a superabundance and so overwhelms the existing demand as to reduce the value or profit increment to a level below that which would prove attractive to a prudent man, the material cannot be said to be marketable at a profit. 5/ [Emphasis added.]

* * * * *

4/ A hypothetical market in which the claimant's material is the only unmarketed material taken into account is hardly a useful supposition. If claimant's material can be marketed, then so can that from all potentially competitive sources. To exclude all unmarketed material save that of the claimant could result in the unrealistic conclusion that all such material, considered claim by claim, is marketable at a profit notwithstanding the fact that if the claims had all been actively operated none could have done so profitably.

5/ If the newcomer fails to establish marketability under this test, it would not be due to preemption of the market by established operators (reliance on which is precluded by Barrows), but because of the total amount of material available and the limited demand for it.

Applying the Melluzzo criteria to the case at hand it immediately becomes apparent that if the material from the Bradford No. 4 were included with all the other known potentially competitive sources in the Las Vegas Valley in calculating the factor of supply, the limited Las Vegas market demand could not possibly have absorbed more than a tiny fraction of the available supply. This was remarked by the District Court in Osborne v. Hammit, supra, and noted in the previous Departmental decision. The District Court said:

[T]he record discloses a situation where, if the Bradford Claims could be sustained on the hypothetical and speculative opinion evidence relied

upon by the plaintiffs, each of the claims in the valley comprising over 100,000 acres might be separately validated on the same sort of theoretical evidence. The end result would be that 100,000 acres of public lands would have been patented as valuable for mining, where it is evident and shown by the record that not more than one percent of the material might have been marketable in the reasonably foreseeable future.

* * * * *

* * * Sand and gravel of the same general quality found in the Bradford Claims is readily available in thousands of adjoining acres.

377 F. Supp. at 985.

Also, the District Court for the District of Nevada recently noted in affirming a decision of this Board:

The record before this Court show that throughout the years, the Department of the Interior has been fairly liberal in acknowledging the validity of sufficient claims to supply the sand and gravel market in the Las Vegas area. It is crystal clear that all the sand and gravel in [the] Las Vegas Valley is not presently marketable and never has been marketable. There is and has been a market for only a portion of it.

Block v. Morton, Civ. No. LV-74-9 (D. Nev., filed June 6, 1975), aff'g United States v. Block, 12 IBLA 393, 80 I.D. 571 (1973).

Shafer testified that his study of the sand and gravel situation during 1953-54 included an inspection of the mining record of Clark County, Nevada (1954 Tr. 41), and the abstracts of title supplied by a private title company with which BLM had a contract (1954 Tr. 66). His study was focused on an area with a radius of roughly 15 miles around Las Vegas (1954 Tr. 51). At the time of the hearing he had completed his review of title documents covering 70 sections of land. On the basis of this work Shafer estimated that there were between 800 and 1,000 unpatented mining claims covering an area of approximately 150 to 175 sections of land. He said that the quantity of sand and gravel in the Las Vegas Valley is almost unlimited. He also said that sand and gravel were the only mineral deposits of any economic worth whatever, and that it could be assumed that any claims located on the Valley floor had been located exclusively for sand and gravel (1954

Tr. 50). He testified that within the Las Vegas Valley at least 75 percent of the land could be called sand and gravel land (1954 Tr. 70), and that the material on the subject Section 32 is similar in character and quality to that of surrounding sections and within the same general area (1954 Tr. 71).

Moreover, as noted supra, Exhibit No. 1 shows that at the time approximately 3,670 acres of land averaging 6 to 7 miles closer to Las Vegas had already been patented as valid sand and gravel placer mining claims. 7/

In United States v. Gibbs, supra, 13 IBLA at 397, this Board took notice of the super-abundance of sand and gravel in the Valley and the great number of mining claims, both patented and unpatented, located there for those minerals, and we noted the obvious fact that the market demand of Las Vegas and environs could not absorb all the material from these sources in the foreseeable future if they were simultaneously available. We said, however, that the super-abundant presence of sand and gravel does not establish the fact of a super-abundant available supply, thus eliminating potential sources of supply from our consideration of the market and taking into account only actual sources which were actively engaged in supplying the market. The fallacy of so doing has now been highlighted by the Court of Appeals in Melluzzo v. Morton in the passages quoted, supra. It is clear, therefore, that on the basis of the super-abundant supply of sand and gravel "from all other potentially competitive sources" in the Las Vegas Valley in 1955, that the material from the Bradford No. 4 claim would stand in no better marketing position than most, if not all, of the 800-plus other claims which, theoretically, were also within economic "striking distance" of the limited Las Vegas market.

The limitations of that market are also indicated by the record in this case. Aside from the testimony of Shafer and Henderson, supra, that only about 200,000 yards of concrete aggregate were sold in the Las Vegas area in 1953, we have Contestee's exhibit D, a publication of the Las Vegas Chamber of Commerce. On page 29 are statistics compiled from records of the local governments showing the dollar valuation of building permits for the entire Las Vegas area from 1954 to 1963. Contestees referred to these figures at the 1964 hearing to support the statement that there was an increasing market from 1954 to 1963. Those figures are:

7/ In United States v. Gibbs, supra, 13 IBLA at 397, we noted that the record showed that the Department had patented more than 4,000 acres of sand and gravel claims in the vicinity.

YEAR	TOTAL
1954	\$62,858,060
1955	57,759,015
1956	26,827,901
1957	26,591,835
1958	30,788,942
1959	50,297,270
1960	63,696,418
1961	89,931,827
1962	188,592,538
1963	220,268,269

As may be seen, the demand for construction increased from \$62,858,060 to \$220,268,269 in 1963, nearly a four-fold increase in demand in a period of 10 years. Those figures clearly support contestees' assertion that the size of the market increased dramatically in that period. However, as we have noted several times, for a mining claim located for common varieties of sand and gravel prior to July 23, 1955, to be considered valid, the evidence must show that a person of ordinary prudence could have begun operations prior to that date, even though a particular claimant may not have done so. If there were no sufficient market at that time, the development of a more receptive market after July 23, 1955, is simply irrelevant, as claims for common varieties of sand and gravel could not be perfected after that date. 30 U.S.C. § 611 *et seq.* (1970); *Palmer v. Dredge Corp.*, 398 F.2d 791 (9th Cir. 1968), *cert. denied*, 393 U.S. 1066 (1969). It is clear that the dollar value of building permits declined very sharply from 1954 to 1957. In fact the value declined from \$62,858,060 in 1954 to \$26,591,835 in 1957, a decline of more than 57 percent. The decline from 1954 to 1955 was approximately 8 percent and from 1955 to 1956 over 50 percent. The market did not even recover to its 1954 level until 1960. In short, the market for construction materials such as sand and gravel was in a slump from 1954 to 1960. The slump was marked by a very sharp drop in demand from 1954 to 1957 and recovery to 1954 levels from 1958 to 1960. Given this slump in overall demand and the competitive nature of the market, would a prudent man have begun actual operations in 1955? While a person would not thereby be precluded from beginning operations, it is unlikely that he would choose to do so unless he had some unique advantage over his competitors such as superior quality or lower costs. Nothing in the record indicates that the contestees have such an advantage. In fact, as we noted earlier they are at a distinct disadvantage because of a longer hauling distance relative to several thousand acres of patented claims closer to town.

In sum, we find that the Departmental decision styled United States v. Osborne, 77 I.D. 83 (1970), holding that the Bradford No. 4 placer mining claim is null and void, does not depend upon the testimony of Robert T. Webb. Rather, the holding is premised upon a thorough analysis of the entire body of evidence adduced at the hearing by both the contestant and the contestee, which evidence includes the relevant and material portions of the 1954 record of the hearing of the contest of the Bradford Nos. 1, 2 and 3 claims.

Specifically, we find (1) that proper evidentiary standards were applied in the making of the decision; (2) that the administrative record supports the holding that the claim is null and void; and (3) that the criteria articulated in Verrue v. United States, supra, and subsequent decisions were not violated, but the decision was made on the basis of substantial evidence not of the character rejected by the Court of Appeals in Verrue and subsequent cases.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, and pursuant to the order of the United States District Court for the District of Nevada, supra, we find that the Secretary's decision in United States v. Osborne, 77 I.D. 83 (1970), was properly made and correct in its conclusion, and that the decision should be sustained, and we so hold.

Edward W. Stuebing
Administrative Judge

I concur:

Martin Ritvo
Administrative Judge

ADMINISTRATIVE JUDGE THOMPSON CONCURRING IN THE RESULT:

This panel is in general agreement that the Bradford No. 4 mining claim was properly declared invalid because the evidence does not support a finding that the sand and gravel from the claim could have been marketed profitably while the land remained open to location for such deposits. I wish only to emphasize certain points and to note a major disagreement on one matter stated in Judge Stuebing's opinion.

Contestees in their brief to this Board following the Court remand argue strongly, *inter alia*, that the prior Court proceedings in this case required that the Bradford No. 4 mining claim be sustained. They refer expressly to the statement by the United States District Court for the District of Nevada, on p. 24 of its order of remand (Civil LV 1564, RDF, November 27, 1974) that "the Secretary may have applied the wrong criteria in determining that the prudent-man and marketability tests were not met as to this particular claim." Nevertheless, the Court remanded the case to the Secretary "to re-examine the issues presented and re-evaluate the criteria he applied in making his decision in the light of Verrue [v. United States, 457 F.2d 1202 (9th Cir. 1972)] and this opinion." While the Order raises some questions, it does not purport to find the claim valid, nor to limit the Department's reconsideration of the case. It only required a reconsideration of the case in light of the Court opinions.

While we are specifically directed to reconsider the matter in light of Verrue and the opinions of the Court in this case, we are not precluded from analyzing and applying additional Court opinions pertaining to criteria for evaluating sand and gravel claims which emanated from the United States Court of Appeals for the Ninth Circuit after Verrue. These cases include: Melluzo v. Morton, 534 F.2d 860 (9th Cir. 1976), and Clear Gravel Enterprises Inc. v. Keil, 505 F.2d 180 (9th Cir. 1974). There is an additional opinion by the District Court, Block v. Morton, Civ. No. LV-74-9 (D. Nev. June 6, 1975). These cases are instructive concerning criteria to be used in the highly competitive area of Las Vegas valley, Clark County, Nevada, where much of the material theoretically could be used for the same purposes that deposits of sand and gravel were being extracted and marketed for prior to 1955. The Verrue case involved lands in another state and did not consider the particular problem faced in the Las Vegas valley area.

Essentially, however, the major problem in all these sand and gravel cases is to determine what may be accepted as credible evidence that material on a mining claim could have been marketed profitably on or before enactment of section 3 of the Act of July 23, 1955, 30 U.S.C. § 611 (1970), or an earlier cut-off date

by withdrawal of the lands from mining. My views on the proper considerations to be made are expressed in my dissent in United States v. Gibbs, 13 IBLA 382, at 399-415 (1973), specifically pertaining to the Las Vegas valley area, and also in the majority opinion in United States v. Taylor, 19 IBLA 9, 82 I.D. 68 (1975), pertaining to a different area. The more recent Court cases have reinforced those views.

I only add here that the evaluation of opinion evidence is very critical where no sales or development of a claim have been made. Such opinion evidence is addressed to the hypothetical question whether material on the claims could have been profitably marketed prior to the cut-off date. Evidence concerning the quality and quantity of material, marketing conditions, etc. is relevant to show a possible hypothetical ability of the claimant to have been able to capture a portion of the market at that time. However, where there is a super-abundant supply of the material, such as existed in the Las Vegas valley, all possible supply sources must be considered. Therefore, where a claimant failed to enter the "race" to capture the market, as so well stated by the Court in Osborne v. Hammit, 377 F. Supp. 977 (D. Nev. 1964), the fact that he did not, renders those opinions not credible. This is fortified by a failure to make any attempt to market the material for years after the cut-off date for the location of common varieties of sand and gravel. I do not read Verrue nor the Court decisions in this case as changing this essential analysis concerning the evaluation of opinion evidence on a hypothetical conclusion which would be impossible to disprove as to literally thousands of acres of land containing millions of tons of deposits more than the market place could ever hope to reach.

There is no need for further elaboration or discussion of the evidence set forth by Judge Stuebing. In short, contestees' evidence rests upon optimistic opinions of their witnesses of possible profitable marketability prior to 1955. In the circumstances of the general marketing area with the over-abundant supply of material, these opinions cannot be accepted as credible evidence. To accept these opinions as establishing the hypothetical conclusion, we would have to accept similar opinions concerning much of Clark County. Such opinions have been held to be unsupportable not only in Osborne v. Hammit, *supra*, and in many other earlier cases, but in the recent cases, Clear Gravel, and Block, *supra*. See also Melluzzo, *supra*. Accordingly, I agree that upon reconsideration we must sustain the prior Departmental decision as properly applying the marketability prudent-man test and properly weighing the evidence.

My major disagreement with Judge Stuebing's opinion concerns headnote 6 and the brief comments suggesting a discussion of what has been known as the "comparative value" test. Our determination

in this case is reached independently of considerations of the value of the land for other purposes and the issue really is of no importance here and may be disregarded. I wish only to note that it is true that evidence of nonmineral values of land may be used in considering the credibility and good faith of a mining claimant. This and the question of consideration of nonmineral values of land in relation to the prudent-man test were discussed in United States v. Kosanke Sand Corp., On Reconsideration, 12 IBLA 282, 299, 314, 80 I.D. 538, 547, 553 (1973). This question of mineral versus nonmineral character is a separate issue from the prudent-man test, although closely linked. If an issue of mineral character is definitely raised and is crucially dispositive of a case, I suggest that the many court and Departmental decisions using a comparative value test to determine the character of the land should still be used, especially when the alleged mineral character is due to widespread materials such as sand and gravel. E.g., United States v. Northern Pac. Ry. Co., 1 F.2d 53, 57 (D. Mont. 1924); Layman v. Ellis, 52 L.D. 714 (1929).

Joan B. Thompson
Administrative Judge

